Newhall

Notice and Assent in Robate Proceedings

RULES

AS TO NOTICE OR ASSENT AND THE GIVING OF BONDS

IN THE MORE COMMON
PROBATE PROCEEDINGS
IN MASSACHUSETTS

BY
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TABLE OF CONTENTS

INTRODUCTION

The generous reception given to my book on the Settlement of Estates and to the several pamphlets which preceded it convinces me that the members of the bar generally appreciate any effort to explain our complicated system of probate law. This has encouraged me to attempt what is perhaps the most difficult problem in the whole field of probate practice, namely, to reduce to a clear and simple statement the requirements as to notice and assent in probate proceedings. *Who must be notified or whose assent must be obtained in order to put through a particular matter in the probate court*? This is the question which confronts a probate practitioner in connection with almost every petition which he files. In a large proportion of cases he must seek special information from the judge or register personally.

The task has been a very difficult one, owing to the variation in the requirements and practice in the different counties. Accordingly, I have tried to make my statements elastic, and to indicate the varying degrees of notice which may be required. Persons using the pamphlet, however, should keep in mind that owing to the large discretionary powers vested in each probate judge, requirements are certain to vary, not only in different counties, but with different judges in the same county, and if the court insists on a particular notice being given, the petitioner has no choice but to comply.

What I have said should not be interpreted as hostile criticism of either our probate system or the courts which administer it, for both of which I have the most profound admiration. Certain differences of practice in the different counties are inevitable. Courts whose business comes from the large cities are apt to be stricter in their requirements than those dealing with smaller communities, where people are better known to one another and to the court. At the same time, there is a great opportunity for a "getting together" in the direction of more uniformity, and it is my

hope that the setting forth of the differences in this pamphlet may result in an improvement in that direction.

I have not attempted to include all forms of probate petitions, but only those more frequently brought. I wish to acknowledge the great assistance which I have received from the judges and registers in the different counties, and hope that this pamphlet will be of assistance to the bar. I earnestly invite correspondence from any persons who have suggestions or criticisms leading to its improvement or the correction of errors.

GUY NEWHALL

Lynn, Massachusetts
March, 1918.

GENERAL RULES

(1) **Requirements as to Notice very Uncertain.** — It is difficult to lay down definite rules as to notice in probate proceedings. Very rarely does the statute prescribe any particular notice, most of the requirements being fixed by the probate forms, which, when they have been duly approved by the Supreme Judicial Court, have the force of law (R. L. 162, § 29; Baker *v.* Blood, 128 Mass. 543.) Even within these limits much is discretionary with the court, and, as I have previously stated, the practice varies very much in the different counties, and in some cases with the different judges in the same county.

In preparing this pamphlet the author has freely consulted the different probate judges and registers, particularly in the larger counties, and very gladly acknowledges his indebtedness to them for their assistance. It is believed that in the main the requirements herein set forth will be found to follow substantially the practice in most of the counties.

(2) **Assent to Take the Place of Notice.** — In any matter where notice is required, except to creditors, it may be dispensed with if *all* parties entitled thereto assent in writing to the proceedings, or waive notice in writing, or appear voluntarily. Likewise, if some of the parties assent, waive notice, or appear, notice may be dispensed with as to them. (See R. L. 162, § 45).

(3) **Assent or Waiver Must be of Competent Parties.** — There is a very important distinction to be observed between notice on the one hand, and assent, waiver or voluntary appearance on the other. Wherever notice is required, this requirement is satisfied by service in the manner indicated by the citation, whether the parties upon whom notice is to be served are residents or non-residents, minors or adults, competent or incompetent. If they are minors or mentally incompetent, the court may appoint a guardian ad litem or next friend to represent their interests. But where notice is to be dispensed with by assent, waiver or voluntary appearance, this must be by *competent* parties, so that if

any of the persons interested are minors, or have been adjudged insane, or committed to an institution for the insane, their assent, waiver or voluntary appearance must be by their legal guardians. If there is any doubt about the competency of a party, it is wiser to serve a citation upon him and have a guardian *ad litem* or next friend appointed to represent him.

(4) **No Substitute for Written Assent.** — Wherever by statute, rule or practice assent in writing is specifically required, nothing else will take the place of it.

(5) **Kinds of Notice.** — Notices (or citations as they are called in probate practice) are of two kinds; (a) personal service, and (b) publication.

(a) *Personal Service* means actual personal service upon the party, usually fourteen days (in a few cases, seven days) before the return day of the citation, and may be made anywhere, within or without the Commonwealth, regardless of the age or legal capacity of the person served. The requirement of personal service is not satisfied by leaving at the last and usual place of abode; it means actual personal notice. (See Parker *v.* Abbott, 130 Mass. 25) The court may, in its discretion, direct the service to be made by registered mail. (St. 1915, c. 24).

(b) *Publication* means publication in a newspaper for three successive weeks, and usually (but not always) the court requires in addition mailing or delivering a copy of the published notice to all persons interested seven or fourteen days before the return day of the citation. Where the citation reads "publication" and does not require mailing, it means that the only notice required is by publication, without mailing copies. In Suffolk and some of the other counties "mailing" is practically always required on a citation by "publication," and it is submitted that this a just requirement and should be made uniform.

Where there is any possibility of the existence of unknown heirs or unknown parties interested, it is always better to give notice by publication.

(6) **Guardian ad Litem and Next Friend.** — The power of the court to appoint a guardian *ad litem* or next friend to represent minors, incompetents, absentees and unascertained persons who are or may become interested is assumed without special mention in most instances. In many cases such an appointment is necessary in order that the decree of the court shall be conclusive. It is, however, to such an extent a matter of discretion that no general rule can be laid down as to when it will be required. (See Probate Rule No. IV.)

(A)

PROBATE OF WILL AND APPOINTMENT OF EXECUTOR

With Sureties

(R. L. 136, St. 1905, c. 90.)

(1) Notice must be given to all parties interested, *i. e.*, the surviving husband or wife, if any, and *all* the next of kin. This may be either by personal service (fourteen days), or by publication and mailing (or delivering). Parties interested are the surviving husband or wife, and all the next of kin.

(2) According to the strict letter of the law, legatees and devisees are not parties interested and need not be notified. As a practical matter, however, they are very much concerned, both in the appointment of the executor and in the giving of the bond. Accordingly, in some of the larger counties, particularly Suffolk, the court requires that they be notified in all cases. As an exercise of judicial discretion it would seem to be a wise requirement.

(3) If all parties interested assent in writing, or waive notice, or appear voluntarily, *no notice* is required. (If the surviving husband or widow and all the heirs and next of kin assent in writing, the will may be allowed without testimony. St. 1912, c. 493).

NOTE: — The allowance of a will is in derogation of the rights of the next of kin. They are accordingly interested parties, but as the proceeding is in the nature of a proceeding *in rem*, it is valid notwithstanding one or more of the heirs may be omitted from the petition or fail to receive notice. No particular notice is specified by the statute, and under the rules a general notice is sufficient, even if it fails in fact to reach the parties interested. The only remedy of a person who is not notified is by petition to vacate the decree. Also, the fact that some of the next of kin are minors or insane does not deprive the court of its power to proceed. (See Bonnemort v. Gill, 167 Mass. 338.)

(See general rules given above)

(B)

PROBATE OF WILL AND APPOINTMENT OF EXECUTOR

Without Sureties

(R. L. 149, §3.)

(1) Notice by publication is *absolutely* necessary in all cases.

(2) If the will exempts the executor from giving sureties, notice by publication and mailing as in A-1 *supra* is all that is required.

(3) If the will does *not* exempt the executor from giving sureties, there must be notice by publication and mailing as in A-1 and, in addition, the assent in writing of *all* devisees and legatees having present vested interests under the will. (See Dexter *v.* Cotting, 149 Mass. 92). That is, the allowance of the will requires notice to the next of kin, and the exemption from giving sureties requires the assent of those interested under the will. If any of the latter are minors, most of the probate judges require the assent of their legal guardians, although the statute does not expressly require the appointment of legal guardian for minors who have none. (See Wells *v.* Child, 12 All. 330.)

(See general rules given above.)

(C)

APPOINTMENT OF ADMINISTRATOR

With Sureties

(R. L. 137, § 1; St. 1914, c. 702)

(1) If the deceased was married, and the surviving husband or wife petitions for appointment, the petition may be allowed without notice to the children or next of kin, although in some cases the court will require that they be notified. If the surviving husband or wife is not the petitioner, but assents to the petition of a third person, the same rule probably holds true, although most of the probate judges require notice to the next of kin, as in (3) below.

(2) If the deceased left no surviving husband or wife, and the petition is signed or assented to by all of the next of kin of full age and legal capacity resident within the commonwealth, no notice is required.

(3) If the petition is signed or assented to by any one of the next of kin, notice by publication alone is sufficient, *or* personal service on all the next of kin who are of full age and legal capacity resident within the commonwealth, fourteen days before the return day of the citation. If there is a surviving husband or wife, the court in such a case would require that he or she have actual knowledge of the petition, if practicable. In some counties, particularly Suffolk, a more comprehensive notice is required. If the citation is served by publication and mailing or by personal delivery, the service must be upon *all* the next of kin, regardless of age, residence or legal capacity.

(4) If the petitioner is a creditor or some person other than husband, widow or next of kin, and the petition is not assented to, as provided in the first and second paragraphs, notice must be given as provided in the third paragraph. If the only heir is a minor or insane person, the court would in most cases require the appointment of a guardian (not merely a guardian *ad litem*) to represent the ward, although probably this would not be legally necessary if the court saw fit to act without so doing.

NOTE: — In the appointment of an administrator with sureties, the

(D)

APPOINTMENT OF ADMINISTRATOR

Without Sureties

(R. L. 149, § 3)

(1) There is only one method by which such an appointment may be made, and that is notice by publication, together with the assent in writing of *all* parties interested in the estate, *i. e.*, the surviving husband or wife and *all* the next of kin. If any of these are minors, or have been adjudged insane, a permanent guardian (not a guardian *ad litem*) must be appointed to give the necessary assent. This latter rule is, however, more the result of general practice than an express requirement of the statute. See *supra* B-3.

The result of the foregoing rule is that if a person dies intestate, leaving a minor child, it is necessary either to have a bond with sureties given by the administrator, or to appoint a guardian for the minor, who must give a bond with sureties. The tendency is to adopt the former course, but in most instances it will prove more advantageous to adopt the latter course and have the guardian assent to an administrator's bond without sureties.

(See general rules given above.)

only persons who have to be considered in the matter of notice or assent are the next of kin who are of full age and legal capacity resident within the Commonwealth. The assent of or notice to minors, insane persons, and non-residents is not required, as in the theory of the law they are fully protected by the bond. This rule is not universally accepted, however, and some counties, notably Suffolk, require notice to all. These same counties, however, follow the general rule above stated as to assent. The broader requirement is only as to notice.

The right given to the surviving husband or wife or the next of kin to be appointed administrator is in actual practice a right which can be delegated, so that a petition for the appointment of a stranger signed by one of the persons entitled to preference under the statute has practically the same effect as a petition for his own appointment. This is not so much a matter of law as of practice. The court has the right to appoint "any suitable person," and a stranger whose petition is assented to by one of the next of kin becomes, if otherwise fitted, a suitable person. This same rule applies to administration *c. t. a.* and *d. b. n.* It should be added, however, that the practice on this point varies considerably with different judges, and each county must be considered by itself.

(E)

APPOINTMENT OF SPECIAL ADMINISTRATOR

(R. L. 137, § 9)

(1) The question of notice is wholly discretionary, as the court may appoint with or without notice. Usually, however, some notice is required.

(2) Sureties on the bond are always required.

(F)

APPOINTMENT OF PUBLIC ADMINISTRATOR

(R. L. 138, St. 1908, c. 510)

(1) May be appointed only where there are no known heirs within the commonwealth, and where no petition is filed, signed or assented to by a non-resident heir.

(2) Fourteen days notice to the Treasurer and Receiver General of the Commonwealth is required, and usually notice by publication. The court may and in some cases will dispense with notice by publication.

(3) A bond with sureties is always required.

(See general rules given above.)

(G)

APPOINTMENT OF ADMINISTRATOR WITH THE WILL ANNEXED

(St. 1911, c. 588)

(1) The statute authorizes the appointment of any person interested in the will, any creditor, or any suitable person. Practically this means that the court will recognize the petition of any person have a substantial interest under the will; or, failing this, some creditor. The petition of a stranger, assented to by some person having such interest, will in most counties (but not in all) have the same standing as a petition by the latter direct.

(2) **With Sureties** — Notice must be given to the surviving husband or wife and all the next of kin, in the same manner as in the case of the appointment of an executor, as above described under (A). Regarding the question of notice to persons interested under the will who are not heirs, the same considerations apply as above described under A-2. Strictly speaking, no notice to them is required, unless ordered by the court. There is even more reason, however, in such a case why the legatees and devisees should be notified.

(3) **Without Sureties** — The same rules would apply as under (B), *supra*.

(See general rules given above.)

(H)

APPOINTMENT OF ADMINISTRATOR DE BONIS NON — INTESTATE ESTATES

(R. L. 137, § 8).

(1) The statute authorizes the court to appoint "any suitable person." The practice is to appoint some person who has an interest in the estate, or whose appointment is assented to by a person having such interest.

(2) **With Sureties** — The petition may be allowed with or without notice, in the discretion of the court.

(3) **Without Sureties** — The same rules govern as above explained under (D), except that if the claims of creditors are barred, publication may be dispensed with. On this latter question, however, there is a difference of opinion among the judges. In some counties, notably Suffolk, publication will not be dispensed with. Each judge must be consulted separately.

(See general rules given above.)

(I)

APPOINTMENT OF ADMINISTRATOR DE BONIS NON WITH WILL ANNEXED

(R. L. 137, § 8)

(1) The statute authorizes the court to appoint "any suitable person," as in the case of administrators *de bonis non* of interstate estates, as explained above under (H.)

(2) **With Sureties** — The petition may be allowed with or without notice, in the discretion of the court. Notice, if required, would not be to the next of kin, but to all parties interested under the will, either by personal service or by publication and mailing.

(3) **Without Sureties** — If the exemption from giving sureties is requested by the will, notice by publication and mailing will be sufficient. Notice in such a case would be to persons interested under the will, not to the next of kin, as they are already disposed of by the allowance of the will. If the will does not provide for the exemption, there must be notice by publication, and in addition the assent of all parties interested as provided above under B-3. If the claims of creditors are barred, the same question arises as to notice by publication as under H-3 *supra*.

(See general rules given above.)

(J)
ALLOWANCE OF FOREIGN WILL

(R. L. 136, § 10)

(1) If the will has been allowed in the domiciliary jurisdiction, an authenticated copy of the foreign record should be filed in Massachusetts in some county where there is property of the deceased. Notice of the petition must be given by publishing for three successive weeks, the first publication to be thirty days before the return day, with or without mailing, as the court may order. Some of the judges hold that a foreign will is like any other will, and will allow it without publication if all parties interested assent in writing The general practice is the other way, however, requiring publication in all cases.

(2) The question of sureties on the bond would be governed by the same rules as in the case of a domestic will, discussed under (A) and (B) *supra*.

(3) If the will has not been allowed in the domiciliary jurisdiction, and the circumstances are such that the court will receive it here first, then the proceedings would be the same as in the case of a domestic will.

(See general rules given above.)

(K)

SALE OF REAL ESTATE TO PAY DEBTS, LEGACIES AND CHARGES OF ADMINISTRATION

(R. L. 146, §§1, 10)

(1) Requires notice to or assent of all parties interested. Notice may be either by personal service (fourteen days) or by publication (with or without mailing, as the court may order).

(2) Parties interested are those who are affected by the sale, *i. e.*, all the heirs in the case of intestate estates, and all the residuary legatees and devisees, or the specific devisee of the realty to be sold, in the case of testate estates. In many cases it would seem that all the legatees and devisees are interested in the price for which the estate is to be sold and should be notified. This is a matter of discretion, however. Likewise, if there is any likelihood that the estate may prove insolvent, the court will in some cases order notice to creditors.

Persons claiming under the heirs or devisees have no standing. (Giles *v.* Kenney, 221 Mass. 262).

(See general rules given above.)

(L)

SALE OF REAL ESTATE FOR DISTRIBUTION

(R. L. 146, § 18; St. 1907, c. 236; St. 1917, c. 296)

(1) May be allowed without notice, if all parties interested assent in writing; otherwise, the law requires fourteen days notice by personal service on all parties interested who can be found within the commonwealth, and if there are any who cannot be found within the commonwealth, then publication, either with or without mailing, as the court may require. The published notice affords greater security to the purchaser, as there is always the possibility of the existence of unknown heirs. (See discussion under M-4 and N, *infra*.)

(2) Parties interested are the heirs or devisees, the same as under K-2 *supra*. In addition, however, the petitioner must file an affidavit containing the names of all persons known to him to claim any interest by conveyance or mortgage from any of the heirs or devisees, and if it appears that there are any such, they should be made parties and notified.

(See general rules given above.)

(M)

ALLOWANCE OF ACCOUNT OF EXECUTOR OR ADMINISTRATOR

(R. L. 150)

(1) If all parties interested assent in writing, the account may be allowed without notice. Otherwise, notice is required. It may be given either by personal service (fourteen days) or by publication and mailing. If it is a final account the matter of the inheritance tax must be disposed of, either by a receipt from the Tax Commissioner or by a waiver, before the account can be allowed.

(2) The determination of who are parties interested depends upon circumstances. In intestate estates it includes all the heirs. In the case of property disposed of by will, if the account shows payment of all the legacies in full, or a sufficient balance therefor, the residuary devisee or legatee is the only party interested. If the account does not show payment of the legacies in full or a sufficient balance, all legatees who do not appear by the account to be thus protected are also parties interested. The practice on this point varies, however. Some judges insist on notice to all the legatees unless receipts are filed or their assents obtained. As an exercise of judicial discretion this seems to be a reasonable and just requirement, although the allowance of an account showing payment does not prove the fact of payment or deprive the legatee of any of his remedies against the executor. (See Welch *v.* Boston, 211 Mass. 178, 182.)

(3) To obtain the conclusive allowance of an account where all parties are not determined and *sui juris*, a guardian ad litem or next friend must be appointed to represent persons who are incompetent, unascertained, or not in being. (See R. L. 150, §22).

(4) If the account shows distribution among the next of kin, and there has been no decree for distribution, the allow-

ance of the account (under R. L. 150, §21) will not protect the executor or administrator in making distribution as against unknown heirs or other parties, interested but unknown, unless a general notice is given by publication. In other words, while the court may, and in some cases will, allow the account if it is assented to by, or notice is given to, all persons appearing of record to be interested, the allowance will not protect the executor or administrator if it appears that there were other parties interested of whose existence he was unaware, and who did not receive actual notice, unless a general notice was given by publication. See discussion under (N) *infra*.

NOTE: — No direct authority can be cited for the distinction set forth in paragraph (4) above. In the opinion of the author, however, fortified by discussion with various probate judges, there can be no reasonable question that the law is as stated. A decree for distribution undoubtedly requires a public notice in order to protect the executor or administrator against all the world. If the allowance of an account is to have the effect of a decree for distribution, it clearly must be based upon a similar notice.

It is an interesting question whether it would not constitute a taking of property "without due process" to hold such a decree conclusive against unknown heirs, in the absence of a published notice. (See dissenting opinion of Loring, J., in Tyler v. Land Court, 175 Mass. 71, at 96).

(See general rules given above)

(N)

DECREE FOR DISTRIBUTION

(R. L. 141, § 22; 150, §§ 19, 20)

(1) The usual requirement as to notice is publication and mailing. Publication is absolutely necessary if the decree is to be binding on all the world. A decree for distribution based upon the assent of or personal notice to all persons known to be interested would undoubtedly bind them and persons having actual notice; but if it is to have the effect of protecting the executor or administrator against unknown heirs or parties in interest who do not have actual notice, it must be based upon a published notice. If such notice is given, the decree affords a complete protection to the executor or administrator if he has acted in good faith. (See Cleaveland *v.* Draper, 194 Mass. 118; Libbey *v.* Todd, 194 Mass. 507; Palmer *v.* Whitney, 166 Mass. 306. See St. 1917, c. 22. See also discussion in M-4, *supra.*)

(2) Parties interested are the legatees if distribution is to be among a class such as "the children of A", etc., or the heirs or next of kin in intestate estates. Assignees, etc., of legatees or next of kin are not parties interested. (See Security Bank *v.* Callahan, 220 Mass. 84.)

(See general rules given above.)

(O)

APPOINTMENT OF GUARDIAN OF MINOR

(R. L. 145, §§ 2, 3, 5; R. L. 149, §§ 4, 5)

(1) The petition may be filed by any person interested, and usually requires notice to or the assent of the parents of the minor, or the survivor if only one is living. If neither parent is living, the court may, and in some cases will, order notice to the next of kin, or cause inquiries to be made concerning them. Notice is usually by personal service (seven days), but may be, although seldom is, ordered by publication (with or without mailing, as the court may direct.) If the parents are not within the commonwealth, notice to them is sometimes dispensed with. Notice may be dispensed with in any case if the court so orders, as the statute does not require any. (See Gibson, Appellant, 154 Mass. 378.) If the question of custody is involved the parents are entitled to notice. (R. L. 145, §4; St. 1902, c. 474; 1904, c. 163.)

(2) If the minor is under fourteen years of age, he is not entitled to notice. If over that age, he may, subject to the approval of the court, nominate his own guardian by appearing a before justice of the peace, special commissioner, or city or town clerk. If his nominee is not approved by the court, or if the minor resides out of the commonwealth, or neglects, after being cited, to nominate a suitable person, the court may make the appointment as if he were under fourteen years of age.

(3) The guardian of a minor must always, except in two instances, give sureties on his bond. These exceptions are, first, where the father by will (and if he dies without doing so, the mother) appoints a testamentary guardian, and requests that he be exempt from giving sureties on his bond. In such a case no notice is required, except the notice incident to the probate of the will. The other exception is where a guardian is appointed for a minor with custody, on the ground that the parents or either of them are unfit to have the custody of the minor, in which case the court may in its discretion exempt the guardian from giving sureties.

(See general rules given above.)

(P)

APPOINTMENT OF GUARDIAN OF AN INSANE PERSON

(St. 1909, c. 504, §§99, 107; St. 1911, c. 206)

(1) The petition may be filed by relatives or friends of the insane person, or by the mayor and aldermen of the city or the selectmen of the town of which he is resident or upon which he may become chargeable, or by the Mass. Commission on Mental Diseases.

(2) It requires personal service upon the insane person (his assent will not suffice) and upon the Mass. Commission on Mental Diseases seven days before the return day. The court may, however, for cause shown, direct that a shorter notice be given. In practice a letter to the Mass. Commission on Mental Diseases explaining the situation is usually sufficient, so far as that body is concerned; not that it constitutes legal notice, but because it will usually result in the filing of a waiver or the entering of an appearance.

(3) Also (except in the case of a temporary guardian) it requires notice to or the assent of the husband or wife of the insane person, if any, and his heirs apparent or presumptive, notice to be either by *mailing* a copy seven days before the return day, or by publication (with or without mailing, as the court may order).

(4) Sureties must be given upon the bond in *all* cases.

(See general rules given above)

(Q)

APPOINTMENT OF CONSERVATOR

(R. L. 145, §40; St. 1907, c. 169, § 3; St. 1911, c. 206)

(1) The petition may be filed by anyone having a proper interest therein, and requires notice to or the assent of the aged person and the husband or wife of such person, if any, and his heirs apparent or presumptive. The notice to the aged person must be by personal service seven days before the return day, and to the others either by mailing a copy to their last known post office address seven days before the return day, or by publication (with or without mailing, as the court may order).

(2) If the aged person is himself the petitioner, no further notice to anyone is required; but the requirement of notice to the others is not avoided merely by his assent to the petition of a third person, according to the strict wording of the statute. Some judges disregard this distinction, however, as too technical, and will appoint a conservator upon the petition of a third person, assented to by the aged person, without further notice. On the other hand, some of the judges will not act upon the consent of the alleged aged person alone, but require additional evidence, causing notice to be given to his heirs and even requiring him to be present in court personally, scrutinizing his choice with the utmost care.

(3) Sureties on the bond must be given in *all* cases.

(See general rules given above.)

(R)

APPOINTMENT OF GUARDIAN OF SPENDTHRIFT

(R. L. 145, § 7; St. 1907, c. 169, § 2)

(1) The petition may be filed by a relation or relations of the alleged spendthrift, or by the overseers of the poor of the city or town of which he is an inhabitant or resident, or by the selectmen of a town if there are no overseers.

(2) If the alleged spendthrift assents, no notice is required; otherwise, he must be given notice by personal service seven days before the return day, except that the court may for cause shown direct that a shorter notice be given. No other notice is required. (As to the status in general of the heirs presumptive of the alleged spendthrift, see Sullivan *v.* Lloyd, 221 Mass. 108.)

(3) Sureties upon the bond are required in *all* cases.

(S)

SALE, MORTGAGE OR LEASE BY GUARDIAN OR CONSERVATOR

(R. L. 145, §§ 25, 26, 35; 146, §§ 11, 19-29)

(1) Requires assent of or notice to all parties interested, notice to be either by fourteen days personal service, or by publication (with or without mailing, as the court may order).

(2) Parties interested include the husband or wife, if any, and the heirs apparent or presumptive. Also in the case of an insane person or person under conservatorship seven days notice must be given to the Commission on Mental Diseases. Usually a letter to the latter explaining the situation and asking for a waiver will be sufficient.

(See general rules given above.)

(T)
ALLOWANCE OF GUARDIAN'S OR CONSERVATOR'S ACCOUNT

(1) Requires assent of or notice to all persons interested, notice to be either by fourteen days personal service, or by publication and mailing.

(2) As to who are parties interested, if the guardianship or conservatorship has terminated

(a) by the removal of the disability, without the appointment of a new guardian or conservator, the ward is the only person interested;

(b) by the death of the ward, his executor or administrator is the only party interested (See Cummings *v.* Cummings, 123 Mass. 270);

(c) by the death, resignation or removal of the guardian or conservator, without the removal of the disability, the same persons are interested who must be notified on a petition for the appointment of a new guardian or conservator, i. e., usually the heirs apparent or presumptive. If a new guardian or conservator has been appointed, he must be notified in addition to the others; but if such new guardian or conservator assents to the account, then the others need not be notified.

As a qualification of the above, it should be stated that in the case of an insane person or person under conservatorship, the Mass. Commission on Mental Diseases must be notified on a final account.

(3) If the guardianship has not terminated, the court will usually order notice to the same persons as under (c) in the preceding paragraph, although strictly the ward is probably the only one legally entitled to notice. The Commission need not be notified.

(See general rules given above.)

(U)

APPOINTMENT OF TRUSTEE UNDER WILL OR OTHER WRITTEN INSTRUMENT

With Sureties

(R. L. 147, §§ 4 and 5)

(1) If the will has been allowed and the trustee is named therein, the appointment may be made without further notice to anyone.

(2) If no trustee is named in the will, or if the trustee named therein has died or declined, and there is no provision in the will for filling the vacancy, the petition requires the assent of or notice to all persons interested in the trust, notice to be either by personal service (fourteen days) or by publication (with or without mailing, as the court may order). "Persons interested" are only those who are in being and have present vested interests in the estate. (Dexter *v.* Cotting, 149 Mass. 92, 96). Some of the courts, however, require notice to persons who are determined, but whose interests are contingent, *i. e.*, who have a vested interest in a contingent remainder.

(3) In the case of an appointment of a trustee to fill a vacancy, whether under a will or written instrument, provided it contains no special provision for filling vacancies, the same requirements govern as set forth in the preceding paragraph.

(See general rules given above.)

(V)

APPOINTMENT OF TRUSTEE UNDER WILL OR OTHER · WRITTEN INSTRUMENT

Without Sureties

(R. L. 147, §§ 4, 5,; R. L. 149, § 4)

(1) If the will has been allowed and the trustee is named, and the exemption from sureties requested therein, no further notice or assent is required.

(2) If no trustee is named in the will, or if the trustee named therein has died or declined, and there is no provision in the will for choosing a successor, but the will contains a clause exempting any trustee from giving sureties, the same rules would govern as set forth about under U-2, the only notice or assent required being to procure the appointment, no assent being required to secure exemption from giving sureties.

(3) If the will does not provide for exemption from giving sureties, the petition requires the assent of all persons beneficially interested in the trust, *i. e.*, persons having present vested interests, ~~who are of full age and legal capacity~~. (See Dexter *v.* Cotting, 149 Mass. 92) . If there are any minors who are interested, some judges, particularly in Suffolk, require the assent of their legal guardians. See *supra*, B-3.

(4) The appointment of a trustee to fill a vacancy, whether under a will or written instrument, would be governed by the same rules as those set forth in the preceding paragraphs.

(See general rules given above.)

person [illegible] in default of appointment
not "acted", it seems.

(W)
ALLOWANCE OF TRUSTEE'S ACCOUNT

(1) Requires the assent of or notice to all parties interested, notice to be either by personal service (fourteen days), or by publication and mailing.

(2) The determination of who are parties interested cannot be reduced to a single rule, as it varies with the circumstances. In general, it would include all parties who are or may become interested, either present or future.

(3) In respect to questions concerning merely the disposition of income, only the life tenant is technically interested, and entitled to notice. Some of the judges, however, require notice to the remainderman in all cases. This is on the theory that he is entitled to know what is going on, as his interests may be injuriously affected practically; even though as a matter of law he would not be precluded by the allowance of the account if not cited.

(See general rules given above.)

On the allowance of a former trustee's account, Middlesex requires the assent of the succeeding trustee as well. So does Suffolk, I suppose.

(X)

SALE OR MORTGAGE BY TRUSTEE

(R. L. 147, §§ 15, 16, 18, 19, 20; St. 1907, c. 262; St. 1917, c. 279, §42)

(1) The general rule is notice to or assent of all persons interested in the subject matter of the trust, either by personal service (fourteen days) or by publication (with or without mailing, as the court may order).

(2) As in some other proceedings, the chief difficulty is in determining who are parties interested. If all persons who are or may become interested are definitely ascertained and in being, whether their interests are present or future, vested or contingent, personal service upon them or their assent will be sufficient. If there is, however, any possibility that the personal service or assent may not include all persons who are or may become interested, notice should be by publication. The statute also requires the appointment of a next friend to represent persons who are not ascertained or not in being and who are or who may become interested in the estate. (See Boston Safe Dep. & Tr. Co. *v.* Mixter, 146 Mass. 100.) Some courts require the appointment of a guardian *ad litem* for minors.

(3) A license to sell or exchange personal property may in the discretion of the court be allowed without notice. (St. 1917, c. 155).

(See general rules given above.)

(Y)

PARTITION PROCEEDINGS

(R. L. 184: St. 1917, c. 279, §§ 6, 8, 9, 18-21, 33-34)

(1) Requirements as to both notice and assent are the same, whether the partition is by division or by sale. The general rule is simple. The petition requires notice to (or the assent of) all parties interested, either by personal service or by registered mail, fourteen days before the return day; and if any party is not so served then by publication and mailing.

(2) The difficulty in partition cases is to determine who are parties interested, since owing to the nature of the proceedings the requirements are much more complex. Contrary to the usual rule in probate matters, the present holders of the legal title are the persons who should be made parties, regardless of whether they are the original heirs or co-tenants, or claim under them. This includes all persons having legal title to an estate for years, for life or in fee, whether in possession, reversion or remainder. All such should be made parties and are entitled to notice. A petitioner should make a careful examination of the record to establish just who are the present owners of the various interests, although the statute makes elaborate provisions for the validity of the title provided notice is given by publication. If there is any possible doubt as to the existence of unknown co-tenants, notice should always be given by publication. Mortgagees, lienors, attaching creditors, and other persons claiming incumbrances, are not necessary parties, but should, however, be named in the petition and given such notice as the court may order.

(3) The court may and should appoint a suitable person to act for any party who has not been personally served, and has not appeared, or who is a minor or under other disability and has no guardian or legal representative within the commonwealth, or who is unknown or unascertained. or for any person whose name is unknown or who is unascertained or not in being and who appears by the record to have an estate vested or contingent as a co-tenant of the land of which partition is sought.

(See general rules given above.)